No. 87-645

In the Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Under Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)), the Department of Energy (DOE) sells uranium enrichment services to electric utilities that use enriched uranium as reactor fuel. Section 2201(v) provides that DOE shall restrict its enrichment of foreign-source uranium intended for use in domestic facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Department of Energy has determined that the domestic uranium industry is not viable and that the imposition of restrictions on the enrichment of foreign uranium would not make it viable.

The question is whether Section 2201(v) requires the Department of Energy to restrict the enrichment of foreign uranium whenever the domestic uranium industry is not viable, whether or not the imposition of such restrictions would make the domestic industry viable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 825 F.2d 1430. The order of the district court (Pet. App. 22a-24a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 18, 1987 and was granted on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 161(v) of the Atomic Energy Act of 1954, as it appears codified at 42 U.S.C. 2201(v), provides:

> Contracts for production or enrichment of special nuclear material; domestic licensees; other nations;

prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review

[In the performance of its function the Commission is authorized to]

(A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to Section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:

Provided, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further,* That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission

shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided,* That before the Commisson establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

STATEMENT

This case concerns the meaning of Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v), which requires the Department of Energy (DOE) to restrict its enrichment of foreign-source uranium intended for use in domestic facilities "to the extent necessary to assure the maintenance of a viable domestic uranium industry."[1] The Secretary of Energy has found that the domestic uranium mining and milling industry is not viable, and that restrictions on the enrichment of foreign uranium—including

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[1] The primary civilian use of uranium is as a fuel for nuclear reactors that produce commercial electric power. Because natural uranium does not contain enough of the fissionable isotope U-235 to serve as a reactor fuel, it must undergo a process known as enrichment. The enrichment process for commercial reactor fuel increases natural uranium's U-235 content from approximately one percent to approximately three percent. See Pet. App. 4a.

even a total prohibition on such enrichment—would not make the domestic industry viable. Because the Secretary interpets Section 2201(v) to authorize restrictions on enrichment of foreign uranium only when this would serve the statutory goal of assuring a viable domestic industry, he has not imposed such restrictions. The lower courts disagreed with this construction of the statute, holding that once the Secretary determines that the domestic industry is not viable, he must automatically terminate the provision of enrichment services for foreign uranium, and may not consider whether such termination would have any effect on the viability of the domestic industry.

A. Federal Regulation of Nuclear Materials

Pervasive federal regulation of atomic energy, and in particular of nuclear materials, began with the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946 Act). The 1946 Act created the Atomic Energy Commission (AEC) and established a government monopoly over all aspects of nuclear power and materials. Private persons were forbidden to own nuclear power plants, nuclear enrichment facilities, or nuclear reactor fuel—"special nuclear material."[2] Instead, the 1946 Act provided that "[a]ll right, title and interest * * * in or to any fissionable material * * * shall be the property of the [Atomic Energy] Commission * * *" (§ 5(a)(2), 60 Stat. 760).

Congress thoroughly overhauled the 1946 Act in the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. III) 2011 *et seq.* (1954 Act), which remains the principal statute governing atomic energy. The 1954 Act ended the government's monopoly on the generation of atomic power, authorizing the AEC to license private persons to own and operate nuclear reactors (§§ 102-104, 42 U.S.C. 2132-2134).[3] It did not, however, end the government's monopoly on the ownership of nuclear fuel; all special nuclear material continued to be property of the AEC, and was leased to private nuclear power generators (§ 158, 42 U.S.C. 2188). The 1954 Act thus created an expanded domestic market for enriched uranium—and, derivatively, for the raw uranium produced by the domestic uranium mining and milling industry—but the 1954 Act retained the role of the AEC as the sole buyer from the uranium industry and the sole source of leased fuel for the nuclear power industry. See Pet. App. 3a.

In 1964, Congress enacted the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (the Private Ownership Act), and again substantially revised the federal role with respect to nuclear fuel. The Private Ownership Act eliminated the government's monopoly on the ownership of special nuclear material and permitted private persons—principally, electric utilities operating nuclear reactors—to own enriched uranium. But although the government's legal monopoly on the ownership of nuclear fuel ended, its de facto monopoly as a provider of commercial-scale enrichment services continued. See S. Rep. 1325, 88th Cong., 2d Sess. 2 (1964) [hereinafter *Private Ownership Act Report*]; Pet. App. 4a. Recognizing this fact, Congress authorized the

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[2] "Special nuclear material" is defined in 42 U.S.C. 2014(aa) and includes plutonium and enriched uranium. The term "source material" refers to unenriched uranium or thorium (42 U.S.C. 2014(z)).

[3] Besides restricting ownership of "utilization facilities" such as nuclear reactors, the 1946 Act prohibited private ownership of "production facilities," including enrichment plants (§ 4, 60 Stat. 759). The provisions of the 1954 Act which permit private ownership of utilization facilities also apply to licensed production facilities. There are, however, currently no privately-owned enrichment facilities in the United States.

AEC to offer "toll enrichment" services, whereby utilities could obtain unenriched uranium on the open market and have it enriched by the AEC for a fee.

One purpose of permitting private ownership of special nuclear materials was to put the relatively young domestic uranium industry on a sounder economic footing. By allowing the uranium industry and nuclear fuel users to function in a more normal market relationship, the Private Ownership Act hoped to encourage "the domestic uranium mining and milling industry to develop normally without future reliance on the U.S. Government for its market" (*Private Ownership Act Report* 10). Nevertheless, Congress was concerned about what might happen to the uranium industry in the transition period from a controlled to a more open market, and in particular about the possible effects of competition from foreign sources of uranium. After hearing in considerable detail from the Atomic Energy Commission as well as uranium producers and consumers (see *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 1st Sess. (1963) [hereinafter *1963 Private Ownership Hearings*]; *Private Ownership of Special Nuclear Materials: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 88th Cong., 2d Sess. (1964) [hereinafter *1964 Private Ownership Hearings*]), the Joint Committee on Atomic Energy decided that AEC enrichment of foreign uranium for use in domestic facilities – which at the time was the only way foreign sources could effectively compete with domestic producers – was a question "of sufficient importance to be treated specifically in the legislation" (*Private Ownership Act Report* 30). Congress accordingly included in the authorization of toll enrichment the proviso that the AEC must restrict enrichment of foreign-source uranium for

domestic use "to the extent necessary to assure the maintenance of a viable domestic uranium industry" (§ 161(v), 42 U.S.C. 2201(v)).

Section 2201(v) also directed the AEC to "establish criteria in writing" which would include a provision governing "the extent to which such [enrichment] services will be made available for source or special nuclear material of foreign origin intended for use [domestically] * * *." The initial criteria established by the Commission (see 31 Fed. Reg. 16479 (1966)) provided that the AEC would enrich no foreign-source uranium for domestic use. In 1974, after soliciting comments (38 Fed. Reg. 32595 (1973)), the AEC amended its enrichment services criteria by establishing a schedule by which all restrictions on enrichment of foreign uranium for use in domestic facilities would be eliminated by 1984 (39 Fed. Reg. 38016 (1974)).[4] The scheduled phase-out of restrictions took place as planned, and DOE has not since reimposed any restrictions on enrichment of foreign uranium.[5]

B. The Collapse of the Domestic Uranium Industry

1. In the late 1970's and early 1980's, the economic condition of the domestic uranium industry deteriorated rapidly and dramatically (Pet. App. 5a). The main cause of this development was "a classic oversupply situation"

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[4] The criteria permitting the enrichment of foreign uranium were reported to Congress pursuant to Section 2201(v)'s 45-day report-and-wait provision; Congress took no adverse action.

[5] The AEC was abolished in 1974 by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, § 104(a), 88 Stat. 1237. Its "licensing and related regulatory functions" were transferred to the Nuclear Regulatory Commission (NRC) (§ 201(f), 88 Stat. 1243). All other AEC functions, including the enrichment services program, were transferred to the Energy Research and Development Administration, a predecessor of the Department of Energy (DOE) (§ 104(c), 88 Stat. 1237).

(*Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearing Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 15 (1981) (statement of Shelby Brewer, Assistant Secretary of Energy for Nuclear Energy) [hereinafter *1981 Hearing*]). On the one hand, domestic exploration and other investment in the uranium industry had increased significantly in the 1970's, in response to optimistic projections of future demand (*id.* at 19-20 (charts 2, 3, 4, showing peak and decline of exploration, employment, and capital expenditures)). But just as supply was increasing, developments threatening the economic feasibility of nuclear power generation, and heightened concerns over reactor safety triggered by the Three Mile Island incident, led to a wave of "reactor delays and cancellations, and [a] lack of new reactor orders" (*id.* at 12).

The result was a precipitous decline in the price of uranium ore. As one report put it, the industry suffered "a collapse that by industrial standards occurred practically overnight" (Blundell, *U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction*, Wall St. J., June 12, 1985, at 1). In 1981, the Edison Electric Institute, a utility trade association, reported that the spot market price of uranium had plunged from $43.25 per pound in 1979 to $23.50 per pound (*1981 Hearing* 148 (statement of Edison Electric Institute)). By 1984, the spot market price had fallen to $15.50 per pound, which the industry informed DOE was less than one-half the conventional United States producers' average cost of production (51 Fed. Reg. 27132, 27136 n.12 (1986)). The spot market price has not recovered appreciably since then.[6]

[6] The spot market price was $16.30 per pound on February 17, 1988 (see Financial Times, Feb. 17, 1988, at 30).

Other developments also contributed to the decline of the domestic uranium industry during this period. Beginning in the mid-1970's, DOE lost its monopoly as the only provider of enrichment services for commercial nuclear reactors. Two european consortia and the Soviet Union began to supply foreign nuclear facilities with enriched uranium, produced largely from foreign-source ore (51 Fed. Reg. 3624, 3625, 3627 (1986)). By 1986, because of their lower prices, these competitors of DOE had "captured about 60 percent of the total foreign market and * * * made significant inroads into the domestic markets" (*id.* at 3625). Domestic utilities therefore had an incentive to obtain enriched uranium (derived from foreign ore) abroad, bypassing DOE and the domestic uranium industry entirely. Moreover, as part of the same imbalance of supply and demand that affected the domestic uranium mining and milling industry, many utilities found themselves committed to long-term contracts to purchase enrichment services that they no longer needed; this "led to the emergence of a secondary market in which utilities have been willing to sell their surplus SWU's [separative work units] to other utilities at discounts of $30 per SWU and more" (*id.* at 3625).[7] The emergence of this secondary market in enriched uranium created another competitive alternative to the purchase of domestic uranium ore.

[7] A SWU is a measure of the production capacity of uranium enrichment plants and hence a unit in which enrichment services can be measured (51 Fed. Reg. 3625 & n. 1 (1986)). SWU's "measure the amount of effort expended to separate a given amount of natural uranium into two components—one having a higher concentration of fissionable Uranium-235" (*id.* at 3625 n.1). Trade in the secondary market generally takes place in enriched uranium, with quantities measured in SWU's.

2. a. DOE sought to deal with this crisis in the domestic uranium industry in several ways. In an effort to stimulate demand, the Department continued to promote the expanded use of commercial nuclear energy (see *1981 Hearing* 12-13). And in an attempt to minimize the market's perception of oversupply, DOE stated that it would not draw down or sell off the considerable stockpile of uranium under its control (*e.g., id.* at 13). But the Department had no statutory authority to regulate either the importation of enriched uranium, or the secondary market in enriched uranium. Both of these sources, which offer direct competitive substitutes for the product of the domestic uranium industry, were and are subject to the exclusive oversight of the Nuclear Regulatory Commission (NRC).[8]

b. In 1982, Congress turned its attention to the plight of the domestic uranium industry. Although the Senate approved a bill that would have imposed significant restrictions on uranium imports (see 128 Cong. Rec. 5751 (1982)) and a Conference Committee recommended a less drastic but still potentially restrictive measure (see *id.* at Cong. Rec. 26799-26801), the House rejected even the Conference Committee proposal (see *id.* at 28543-28544). Instead, Congress responded to the industry's difficulties

[8] The AEC's authority to license the domestic sale or the importation of special nuclear material (see 42 U.S.C. 2073(a)) is now vested in the NRC. While a license from the NRC is needed to import or transfer enriched uranium (42 U.S.C. 2073(a); see also 42 U.S.C. 2201(b)), no provision of the Atomic Energy Act requires the NRC to exercise its authority to protect the domestic industry or suggests that this authority is directed to economic regulation rather than regulation to prevent radiological hazards or in the interests of national defense and security. Our suggestion in the petition (at 8 n.5) that the NRC's licensing authority with respect to special nuclear material is governed by 42 U.S.C. 2099 was in error; Section 2099 applies to source material, not special nuclear material.

by adding Section 170B to the Atomic Energy Act of 1954, 42 U.S.C. 2210b. This statute sets forth a series of reporting requirements to ensure that Congress can monitor the condition of the domestic uranium industry; requires the Secretary of Energy to promulgate criteria for assessing the viability of the domestic uranium industry, and sets forth eight statutory criteria that the Secretary is to consider in making such a determination;[9] and directs the Secretary to submit annual reports on the viability of the domestic uranium industry to both the President and the Congress.

[9] The statute (42 U.S.C. 2210b(c)) provides:

> Criteria for monitoring and reporting requirements
>
> The criteria referred to in subsection (a) of this section shall also include, but not be limited to –
>
> (1) an assessment of whether executed contracts or options of source material or special nuclear material will result in greater than 37-1/2 percent of actual or projected domestic uranium requirements for any two-consecutive-year period being supplied by source material or special nuclear material from foreign sources;
>
> (2) projections of uranium requirements and inventories of domestic utilities for a 10 year period;
>
> (3) present and probable future use of the domestic market by foreign imports;
>
> (4) whether domestic economic reserves can suply all future needs for a future 10 year period;
>
> (5) present and projected domestic uranium exploration expenditures and plans;
>
> (6) present and projected employment and capital investment in the uranium industry;
>
> (7) the level of domestic uranium production capacity sufficient to meet projected domestic nuclear power needs for a 10 year period; and
>
> (8) a projection of domestic uranium production and uranium price levels which will be in effect under various assumptions with respect to imports.

Pursuant to Section 2210b, the Secretary issued criteria for determining the viability of the domestic uranium industry (10 C.F.R. Pt. 761). Elaborating on the factors specified by Congress, the criteria define "viability" primarily in terms of "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry under a variety of hypothetical conditions" (48 Fed. Reg. 45747 (1983)). Although the financial condition of the domestic uranium industry is one factor to be examined, the criteria make clear that the focus is on whether the industry can supply all of the nation's military and nuclear power needs at an acceptable cost in the event of various future contingencies, such as an interruption of imports. See Energy Info. Admin., Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* x, 55-62 (1986) (evaluation of likely effects of supply interruptions) [hereinafter *1985 Viability Assessment*].

In December 1984, the Secretary made his first viability finding pursuant to Section 2210b and the criteria. He concluded that the domestic industry had been viable in 1983. In September 1985, however, the Secretary determined that in 1984 the industry was not viable. See *1985 Viability Assessment* ix. In December 1986, and December 1987, the Secretary found that the domestic industry was not viable in 1985 and 1986, respectively.[10]

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[10] The Secretary's annual determination of viability is made in a memorandum from the Secretary to the President (see, *e.g.*, J.A. 49-50); the Secretary also informs the President of the Senate and the Speaker of the House of his determination. The Secretary bases his determination on the viability assessment prepared by DOE's Energy Information Administration (see, *e.g.*, *1985 Viability Assessment).*

C. The Secretary's Rulemaking

Four months after the initial determination that the domestic uranium industry was not viable, the Secretary initiated a rulemaking to revise the criteria under which enrichment services are offered. See 10 C.F.R. Pt. 762. The notice of proposed rulemaking specifically addressed the question whether the depressed condition of the domestic industry required the Secretary to impose restrictions on the enrichment of foreign-source uranium under Section 2201(v) (51 Fed. Reg. 3624 (1986) (initiation of rulemaking)). The notice indicated that the Secretary proposed not to restrict the enrichment of foreign uranium, because he believed that "[i]mport restrictions on foreign uranium would not assure the viablity of the domestic mining and milling industry" (*id.* at 3627).

After extensive comment, the Secretary adopted final revised criteria that again did not contemplate any restriction on enrichment of foreign uranium (51 Fed. Reg. 27132 (1986)). The explanation of that decision addressed both the Secretary's understanding of the meaning of Section 2201(v), which had been challenged by comments from the domestic uranium industry, and the question whether restrictions on the enrichment of foreign uranium would in fact assure the viability of the domestic uranium industry. The Secretary adhered to the legal view that "[t]he plain language of the statute makes clear that restrictions are not to be imposed automatically if the domestic industry is non-viable but only if they are needed to, and in fact, will assure the maintenance of a viable domestic uranium industry" (51 Fed. Reg. 27134 (1986)).

On the factual question, the Secretary concluded that "restrictions would not assure the viability of the domestic mining and milling industry" (51 Fed. Reg. 27135 (1986)). The Secretary found that the domestic industry's diffi-

culties arose from "structual weaknesses," chiefly the collapse in demand that had led to a situation in which "the market simply will not sustain a price for [uranium] that enables the industry to recover its costs of production" (*ibid.*).[11] Restrictions on enrichment would do nothing to address those basic difficulties (*ibid.*). Moreover, the Secretary determined that restrictions on enrichment would not protect domestic producers from foreign competition because of DOE's lack of market power in the market for enrichment services: "[w]hile DOE is the only provider of uranium enrichment services in the United States, DOE nonetheless lacks 'market power' because enrichment services are available, at comparable or lower costs, from foreign sources" (*ibid.*). Due to the availability of these competitive alternatives to DOE's enrichment services, "DOE cannot force enrichment customers to use domestic uranium when it is not in their economic self-interest to do so" (*id.* at 27138).

Having found that imposition of restrictions on enrichment would not assure the viability of the domestic uranium industry, the Secretary went on to examine the likely effects of such restrictions. He concluded that "restricting DOE's ability to enrich foreign uranium is likely to be counterproductive and to further damage the U.S. mining industry" (51 Fed. Reg. 27136 (1986)). This was because restrictions on enrichment of foreign uranium would cause some of DOE's current customers to look elsewhere for enrichment services. This in turn would increase DOE's unit costs of production, which would have to be passed on to its remaining customers (see 42 U.S.C. 2201(v)(B)(iii)). The higher charges for DOE's enrichment

[11] "[H]igher grade ore and lower production costs make it possible to buy foreign uranium for less than what it costs to produce domestic uranium." 51 Fed. Reg. 27135 (1986).

services would put the domestic uranium industry (which supplies feed for DOE enrichment almost exclusively) at even greater competitive disadvantage in what had become a world market for enriched uranium (see 51 Fed. Reg. 27135-27136 (1986)). Accordingly, the Secretary adopted final enrichment criteria that do not restrict enrichment of foreign uranium.[12]

D. This Litigation

Respondents, three domestic uranium mining and milling companies, brought this lawsuit in the United States District Court for the District of Colorado on December 7, 1984. The complaint challenged a number of DOE policies and alleged practices (see J.A. 8-10). The only allegation relevant here is set forth in Count I,[13] which claimed that DOE's failure to impose restrictions on the enrichment of foreign uranium for use in domestic facilities is unlawful. In their summary judgment motion, respondents main-

[12] In the continuing resolution that funded DOE for the fiscal year ending September 30, 1987 (Act of Oct. 18, 1986, Pub. L. No. 99-500, § 305, 100 Stat. 1783-209), Congress provided that "no provision of this joint resolution or the July 24, 1986, criteria shall effect the merits of the legal position of any of the parties concerning the question[] whether section 161(v) of the Atomic Energy Act requires restriction of enrichment of foreign-origin source material destined for use in domestic utilization facilities * * *." We do not rely on any provision of the joint resolution as having ratified the Secretary's interpretation of Section 2201(v) as expressed in the preamble to the criteria. We have referred to the explanation accompanying the 1986 rulemaking because it is the most extensive and authoritative expression of the Secretary's assessment of the likely effects of enrichment restrictions on the domestic uranium industry.

[13] The court of appeals mistakenly refers to this issue as Count IV (Pet. App. 14a).

tained that the only material facts were that the domestic industry is not viable and that DOE had not imposed restrictions on enrichment of foreign uranium. On those facts, respondents claimed that they were entitled to judgment as a matter of law. J.A. 27-28; 36. Initially, respondents asked the district court to order DOE to undertake a rulemaking to determine the appropriate level of restrictions. Later, however, they asked the district court to issue an order imposing its own restriction levels. Petitioners submitted a cross-motion for summary judgment in which they agreed that the domestic uranium industry was not currently viable, within the meaning of Section 2210b and the Secretary's criteria (J.A. at 49-50). But petitioners maintained that this did not mean that restrictions had to imposed on enrichment of foreign uranium, because in the Secretary's view such restrictions would not assure a viable domestic uranium industry (*id.* at 46-47, 61-62; 66). [14]

On June 5, 1986, the district court at a hearing granted respondents' motion for summary judgment as to Count I. At the hearing, the court expressed the view that Section 2201(v) requires the imposition of restrictions on enrichment of foreign uranium whenever the domestic industry is not viable, regardless of whether such restrictions would restore viability: "To me [the statute] says that the agency * * * shall not offer [enrichment] services for source or special nuclear materials of foreign origin—period" (J.A. 66, Pet. App. 25a). The district court entered an order re-

[14] The Secretary commenced the 1986 rulemaking (see pp. 13-15, *supra*) while the suit was proceeding in the district court. The final rule was adopted after the district court issued its order, while the order was stayed by the court of appeals. 51 Fed. Reg. 27134 n.4 (1986). This litigation does not involve a direct challenge to the revised criteria adopted in the rulemaking.

quiring DOE to limit its enrichment of foreign uranium to 25% of all material enriched between June 6, 1986 and December 31, 1986, and imposing a total ban on enrichment of foreign uranium beginning January 1, 1987 (Pet. App. 23a). The court further ordered DOE to commence a rulemaking to establish criteria for providing enrichment services that would "assure the maintenance of a viable domestic uranium industry" (*ibid.*).[15]

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit,[16] which affirmed the district court's grant of summary judgment on this issue (Pet. App. 1a-21a).[17] The court of appeals began its analysis by

[15] The court stated that "[i]f the Department believes that criteria less restrictive than those imposed by this order would assure the maintenance of a viable domestic uranium industry, then the Department shall clearly articulate its reasons for such a position" (Pet. App. 23a). Although this order recognizes that the Secretary has discretion to set the level of restrictions when such restrictions would, in the Secretary's view, maintain the viability of the domestic industry, it does not permit the Secretary to do what he believes is contemplated by the statutory language—impose no restrictions when it is impossible, by limiting enrichment services, to assure the viability of the domestic uranium industry, and when in his view, imposition of restrictions would further damage the domestic uranium industry.

[16] The court of appeals entered an order staying the district court's injunction on July 21, 1986. In addition, while this case was pending in the court of appeals Congress adopted a continuing resolution funding DOE and other agencies for the fiscal year that ended on September 30, 1987 which contained a provision expressly authorizing DOE to continue to enrich foreign uranium until this lawsuit comes to "final judgment." § 305, 100 Stat. 1783-209.

[17] The court of appeals also reviewed the district court's decision on another count of the complaint attacking aspects of DOE's standard form enrichment services contract not directly concerned with enrichment of foreign uranium. The court of appeals remanded that issue for further fact-finding to determine whether respondents had standing to maintain their claim. See Pet. App. 6a-14a. This part of the court of appeals' judgment is not challenged here.

noting that the parties agreed that the domestic uranium industry is not now viable (*id.* at 14a). Consequently, the court did not address the meaning of "viability." Stating that the issue under Section 2201(v) involved a question of statutory construction, the court rejected the Secretary's view that the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" means that restrictions need not be imposed when they will not assure the maintenance of a viable domestic industry. Instead, the court found that the statute "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction, until the domestic industry is rejuvenated and becomes viable" (Pet. App. 17a). According to the court, Section 2201(v) "does not provide that increasingly stiffer restrictions are required only to the point that DOE determines that such restrictions will not resuscitate the industry" (Pet. App. 17a-18a). At petitioners' request, the Tenth Circuit has issued a stay of its mandate that will continue until this petition is disposed of.

SUMMARY OF ARGUMENT

Section 2201(v) directs the Department of Energy to restrict the enrichment of foreign-source uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." This means that DOE must determine what level of restrictions will assure viability, and impose it. However, if no level of restrictions will assure viability, the statute does not require DOE to engage in a futile exercise. Section 2201(v) authorizes restrictions on enrichment of foreign uranium for one purpose and one purpose only: to assure a viable domestic

uranium industry. It does not authorize restrictions for any other purpose, even if this might confer a transient economic benefit upon domestic producers.

The district court and the court of appeals read the statute differently. In their view, Section 2201(v) requires the Secretary to impose restrictions on enrichment of foreign uranium whenever the domestic uranium industry is found not to be viable, whether or not such restrictions would have any effect on the viability of the domestic industry. This reading does violence to the statutory language by ignoring the fact that the purpose of restrictions, and of the statute, is to maintain a viable domestic uranium industry. According to the court of appeals, Section 2201(v) mindlessly directs the Secretary to take measures that will not accomplish their explicit purpose.

Respondents in this Court have suggested a third possible reading of the statute. Respondents now suggest that Section 2201(v) may mean that DOE must impose restrictions on enrichment of foreign uranium whenever the agency determines that this is a "necessary condition" of a viable domestic industry, even if such restrictions are not a "sufficient condition" of viability. But the statute does not speak of necessary as opposed to sufficient conditions. It says that restrictions are to be imposed to the extent necessary *to assure* a viable domestic industry. A restriction which is "necessary to assure" viability is, to use respondents' terms, one that is a *sufficient* condition of viability. Furthermore, respondents' reading would require the Secretary to engage in an unbounded exercise in speculative predictions about what might happen if restrictions are imposed in conjuction with various other hypothetical changes in the market or the regulatory climate. There is no support for the notion that Congress had any such exercise in mind when it enacted Section 2201(v).

The history of congressional action on this subject reinforces DOE's interpretation and offers no support for the contrary views. When it enacted the Private Ownership Act in 1964, Congress foresaw a future of continuous growth for the nuclear power industry, in which the relatively young domestic uranium industry would eventually face such a large market for its product that it could compete with foreign suppliers without any threat to its basic survival. The primary purpose of Section 2201(v) was to allow the AEC to phase in competition from foreign sources, so as to assure minimal disruption in the growth of the domestic industry.

What Congress clearly did not foresee is the present state of affairs, where demand for domestic uranium has collapsed and alternative sources of enriched uranium have emerged that render DOE powerless to restore the domestic industry to viability by cutting off enrichment of foreign uranium. Nevertheless, Congress was acutely aware "that many unforeseeable developments may arise in this field * * *." *Private Ownership Act Report* 19 (quoting 60 Stat. 755). Accordingly, it rejected any rigid approach to dealing with competition from foreign uranium, and opted instead for a flexible regulatory standard that would require the Secretary to determine whether restrictions would have any effect on the viability of the domestic industry. The mechanical interpretation of Section 2201(v) adopted by the court of appeals cannot be squared with this approach.

Furthermore, the Joint Committee on Atomic Energy specifically noted that because of future uncertainties, the state of the domestic uranium industry was "a matter which the committee will follow closely with a view to determining whether further legislation is required" (*Private Ownership Act Report* 16). In 1982, faced with

the precipitous decline of the domestic uranium industry, Congress made good on this commitment, and revisited the question of the impact of imported uranium on the viability of the domestic uranium industry. In so doing, Congress specifically rejected a bill that would have imposed mandatory restrictions on the enrichment of foreign uranium. Instead, it directed the Secretary to issue an annual viability determination and report. See 42 U.S.C. 2210b. In effect, the congressional response to the decline of the domestic uranium industry was to reject relief very similar to that imposed by the district court in this case, casting further doubt on the lower courts' interpretation of Section 2201(v).

There are suggestions in the opinion below that the court of appeals' decision may rest, at least in part, on disagreements with DOE on questions that were not presented by respondents' motion for summary judgment. Some of the court of appeals' statements imply that it simply disbelieved DOE's determination—never challenged in this litigation, let alone tested and refuted—that restrictions on enrichment of foreign uranium would not assure the viability of the domestic industry. Such extra-record fact-finding would of course be improper. It is also possible that the court of appeals may have implicitly relied on a definition of viability that is at odds with DOE's understanding. The agency's criteria for making a viability assessment, based on Section 2210b of the statute, focus on whether the domestic industry is capable of meeting all of the nation's military and energy needs at an acceptable cost. The court of appeals, in contrast, may have assumed that viability refers solely to whether the domestic uranium industry is profitable. Although a total prohibition on enrichment of foreign uranium might possibly have some impact on the short run profitability of the domestic uranium industry, it does not follow that

such a prohibition would give rise to an industry that can fulfill the nation's long-run energy and military needs. To the extent the court of appeals' decision may have rested in these implicit disagreements with the Secretary's determinations, it was in error.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 2201 (V) REQUIRES DOE TO RESTRICT ENRICHMENT OF FOREIGN URANIUM WHENEVER THE DOMESTIC URANIUM INDUSTRY IS NOT VIABLE, WITHOUT REGARD TO THE EFFECT RESTRICTIONS MIGHT HAVE ON VIABILITY

A. DOE's Reading of the Statutory Language is Correct

1. *DOE's Interpretation*

Section 161(v) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(v), directs DOE to restrict its enrichment of foreign uranium "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The question in this case is whether it matters, in determining DOE's obligations under the statute, if restrictions in fact *would* assure the maintenance of a viable domestic industry—or indeed, given the court of appeals' complete disregard for consequences, if they even *might* produce viability. DOE maintains that its obligations under the statute depend upon the effects of restrictions on the viability of the domestic uranium industry, and that when it finds that restrictions would not assure viability there is no obligation—and hence no authority—to impose them.

This is the most plausible reading of the statutory language. As the Court has observed, "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 543 (1940). Here,

the statute states its purpose on its face—maintenance of a viable uranium industry—and instructs DOE to employ a specified means—enrichment restrictions—"to the extent necessary to assure" that this purpose is accomplished.[18] The Secretary of Energy, in implementing Section 2201(v), therefore must look first to conditions prevailing in the domestic uranium industry and then to the effects of enrichment restrictions on those conditions. If the domestic industry is viable but enrichment of foreign uranium threatens its viability, then restrictions are to be imposed to the extent necessary to eliminate the threat. Similarly, if the domestic industry is not viable but some level of restrictions would make it viable, then that level of restrictions must be imposed. On the other hand, if the domestic industry is viable and the imposition of restrictions is not needed to keep it viable, then the statute does *not* require, or even authorize, the Secretary to restrict enrichment. For the same reason, if the industry is not viable, and no level of restrictions on enrichment would make it viable, then the statute again neither directs nor authorizes the Secretary to impose restrictions. In short, the statute tells the Secretary when and how to employ a particular causal mechanism to achieve a specified end; when the mechanism cannot achieve the end, the statute requires no action.

This is the intuitive, natural reading of the language; it rests on a purpose that is plain on the face of the provision. Moreover, this Court has held that if there are several reasonable interpretations of the text, the agency may follow its own reading as long as that is a permissible construction. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (agency view will be upheld if it is "a permissible construction" of

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[18] A means-end relationship is traditionally expressed through the word "necessary." See U.S. Const., Art. I § 8, Cl. 18; *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

the agency's statutory mandate). Here, DOE's reading is the most plausible; it is therefore "sufficiently rational to preclude a court from substituting its judgment for that of [the agency]." *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 981 (1986).

In this respect, the case is controlled by *Young* v. *Community Nutrition Institute, supra.* There, the FDA's decision not to promulgate regulations limiting the quantity of a certain carcinogen present in foods was challenged. The FDA's statutory mandate, drawn in words that parallel the language of Section 2201(v), stated that the Administrator "shall promulgate regulations limiting the quantity [of such substance] to such extent as he finds necessary for the protection of public health." Like the lower courts here, the respondents in *Young* "view[ed] the word 'shall' as unqualified," and argued that the phrase "to such extent as he finds necessary" gave the agency "discretion in setting the particular level, but not in deciding whether to set a tolerance level at all" (476 U.S. at 980). Rejecting that argument, this court deferred to the FDA's interpretation of the statute, which was "that the phrase 'to such extent as he finds necessary for the protection of public health' * * * modifies the word 'shall' " (*ibid.*). The agency construction, the Court held, was "sufficiently rational to preclude a court from substituting its judgment for that of the FDA" (*id.* at 981).

The decision below cannot be squared with the Court's holding in *Young*. In *Young*, the Court found that "the phrasing" of the statute at issue was "ambiguous" because the decisive "appositive phrase"—"to such extent as he finds necessary"—was "free-floating" (476 U.S. at 981). In Section 2201(v), however, the phrase "to the extent necessary to assure the maintenance of a viable domestic uranium industry" appears as a prefix to the word "shall," and is clearly the condition precedent of the statutory obligation. Moreover, in *Young* either of two competing

constructions could have been adopted without "endors[ing] an absurd result" whereas, here, the operation of Section 2201(v) would only be "sensible" if DOE's interpretation is upheld. 476 U.S. at 981. Accordingly, this Court's disposition of the much closer question in *Young* necessarily requires deference to DOE's construction of Section 2201(v).

2. *The court of appeals' view*

The court of appeals' reading, by contrast, is ill-considered. According to the court of appeals, DOE must impose enrichment restrictions whenever the domestic industry is not viable, without regard to the effect of restrictions on viability. As that court put it, Section 2201(v) "does not provide a scenario in which the DOE is excused from restricting foreign enrichment notwithstanding a nonviable domestic industry" (Pet. App. 17a). This approach treats non-viability as a triggering event, and ignores the fact that viability is the provision's—and the restrictions'—*purpose*. According to the court of appeals, Section 2201(v), which states its purpose on its face, commands DOE to engage in pointless action.

The court of appeals appears to have been led astray by the fact that the statute is obviously mandatory in one sense, and by the mistaken impression that DOE was claiming unfettered discretion to decide whether or not to impose restrictions. The court of appeals correctly noted that " 'shall' is usually mandatory language" (Pet. App. 17a), and correctly reasoned that Section 2201(v) imposes a non-discretionary duty on the agency. See *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772-775 (1984). But starting from those sound premises, it was error to conclude that, because the agency has a mandatory duty to take certain measures

when they will achieve a stated goal, it has a similar duty to take those measures whether or not they will achieve the goal. Moreover, DOE has never maintained that it has the discretion to "abandon the statutory goal" (Pet. App. 18a). DOE's position has always been that it must exercise its judgment and expertise in deciding whether restrictions would meet that goal and, if they would not, that it is not compelled to impose pointless restrictions. DOE's position rests, not on a claim of inherent agency discretion, but on the language of Section 2201(v).

An examination of the possible consequences of the court of appeals' construction confirms its error. If the court of appeals is correct, then the statute forbids any inquiry into the reason the domestic industry is not viable, even if that reason is something that restrictions cannot possibly redress. Thus, if domestic uranium has become prohibitively expensive or (in the extreme case) if domestic reserves have been completely exhausted, the court of appeals' reading would nevertheless force DOE to impose a total restriction on enrichment of foreign uranium—even though the only consequence of such a restriction would be to put DOE out of the enrichment business.[19] Contradictions of this sort arise inevitably when an explicitly goal-directed statute is interpreted without regard to the goal.

[19] Respondents have characterized our use of the total exhaustion hypothetical as "fanciful" (Br. in Opp. 13 n.17). But it is not necessary to posit total exhaustion to make the point: any severe impairment of the domestic industry caused by factors other than imports—such as prohibitively high prices or an industry-wide strike—would present the same dilemma. The hypothetical is embarrassing to the court of appeals' position, precisely because it underlines Section 2201(v)'s structure: the provision has a purpose and relies on a particular causal mechanism in order to achieve that purpose. The court of appeals reasoned as if restrictions were an end in themselves.

3. *Respondents' suggestion*

In this Court, respondents have suggested for the first time (Br. in Opp. 13-14) that Section 2201(v) uses the word "necessary" in the technical, logical sense in which it contrasts with "sufficient." Read in this fashion, the statute requires that restrictions be imposed if they are a necessary condition of viability—that is, if viability cannot be achieved in the absence of restrictions. But, on this reading, the statute does not require that the restrictions be a sufficient condition of viability; other developments in the uranium market, or other policy initiatives, may also be required before the domestic industry is actually restored to viability.

Respondents' suggested interpretation, however, is no more consistent with the statute than that of the court of appeals.[20] The statute does not speak in terms of "necessary conditions" and "sufficient conditions." It provides that restrictions must be imposed to the extent necessary *to assure* the maintenance of a viable domestic uranium industry. A restriction which is "necessary to assure" the realization of a particular goal is different from one that is a "necessary condition" of that goal. To "assure" is "to make safe" or "to make sure or certain"; "to make certain the coming or attainment of" something. *Webster's Third New International Dictionary* 133 (1976). In terms of respondents' logical categories, that which assures is more akin to a sufficient condition than a necessary condition. Thus, the actual language of the statute is more appropriatly construed to mean that restric-

[20] Furthermore, respondents' interpretation does not support the judgment below. If respondents are correct in their assertion that Section 2201(v) requires that restrictions be imposed whenever they are a necessary (but not sufficient) condition of viability, then the judgment below must be reversed, because the lower courts held that there was no need to show that restrictions are necessary to assure viability in *any* sense.

tions must be imposed when they are a *sufficient* condition of viability, than to mean that restrictions must be imposed when they are necessary (but not a sufficient) condition of viability.

Furthermore, respondents' proposed interpretation would require DOE to engage in an unbounded exercise in hypothetical decisionmaking. It would not be enough to conclude that the imposition of restrictions, by itself, would not restore the viability of the domestic industry. In addition, the Secretary would also have to ask whether the imposition of restrictions, in conjunction with other hypothetical changes in the uranium market, or other hypothetical policy measures, would make the industry viable. Moreover, in undertaking this exercise in speculation, the Secretary would apparently have to *exclude* from consideration hypothetical market changes or policy measures that would *by themselves* restore the industry to viability, because with respect to these events the restriction on enrichment services would not be a "necessary condition" of viability. For example, with respect to the specific suggestion made by respondents (Br. in Opp. 14), the Secretary would have to ask whether restrictions on enrichment of foreign uranium, in conjunction with a hypothetical prohibition on imports of special nuclear material by the Nuclear Regulatory Commission, would make the industry viable. If DOE concluded that the two actions together would make the domestic industry viable, it would have to impose restrictions, even though DOE has no power to ban imports of special nuclear material,[21] and

[21] Importation and distribution of enriched uranium requires a license from the Nuclear Regulatory Commission (NRC) (42 U.S.C. 2077(a); see 42 U.S.C. 2073(a) (authorization to issue licenses); 42 U.S.C. 2201(b) (authorization to regulate the "possession and use" of special nuclear material "to promote the common defense and security or to protect health or to minimize danger to life or property")). Licensing authority was originally conferred on the AEC by the Private Ownership Act, which for the first time allowed private persons to own special nuclear material (§ 5, 78 Stat. 603). In response to questioning from the Joint Committee at the first set of hearings on the Private Ownership Act, the AEC's General Counsel expressed the view that the agency's licensing authority could be employed to prevent the importation of enriched uranium that would compete with domestic uranium enriched by the AEC (*1963 Private Ownership Hearings* 30). The licensing provisions of the Private Ownership Act, however, contained no requirement parallel to Section 2201(v) that licensing authority be used to assure a viable domestic industry. Indeed, a proposal that would have required the criteria for the issuance of licenses to include the maintenance of a viable domestic uranium industry (see *1964 Private Ownership Hearings* 198) was specifically rejected (see p. 32 n.23, *infra*). We know of no occasion on which the AEC or the NRC has denied a license to import or resell uranium in order to protect the domestic uranium industry.

even though its restriction of enrichment services, standing alone, would do nothing to restore the domestic uranium industry to viability. On the other hand, if DOE concluded that a prohibition on imports of special nuclear material would itself restore the viability of the domestic industry, then it would *not* have the authority to impose restrictions on enrichment of foreign uranium, because on this assumed state of affairs a restriction on enrichment would not be a necessary condition of viability.

The intellectual gymnastics required by respondents' interpretation of the statute would be unproductive, unsound, and unreviewable. Moreover, there is absolutely no suggestion in the statute or legislative history that Congress contemplated such an exercise. Section 2201(v), in directing DOE to assure viability, authorizes it to employ enrichment restrictions and enrichment restrictions alone; Congress chose a specific means to achieve a specific end and gave no directive concerning any other means. If Congress had wanted the agency to engage in a wide-ranging analysis of enrichment restrictions in conjunction with other possible actions by other actors if would have

spoken in far different words than those which were chosen.

B. The Legislative History of Section 2201(v) and Subsequent Congressional Treatment of This Issue Demonstrate That Congress Has not Required That Enrichment Restrictions be Imposed Whenever the Domestic Uranium Industry is not Viable

1. The Private Ownership Act was enacted during a time of considerable optimism about the future of the nuclear industry in the United States. The Joint Committee on Atomic Energy reported that "great strides" had been made in the development of civilian nuclear power since 1954 (*Private Ownership Act Report* 8): "Spurred on by Government encouragement and assistance, significant progress has been made in reducing the cost of nuclear power during this period." (*ibid.*). Noting estimates provided by the AEC in 1962 of steadily mounting nuclear power capacity through 1980, the Joint Committee reported that these estimates had recently been revised upward by "some 70 to 150 percent" (*ibid.*). In this context, the Joint Committee recommended that private ownership of special nuclear material be authorized in order to facilitate private planning for the future and to eliminate the burden on the government of maintaining and leasing large quantities of special nuclear material to the private sector.

The prospects for the domestic uranium mining and milling industry were also viewed in largely optimistic terms. As the Joint Committee stated (*Private Ownership Act Report* 10):

> Only a decade ago, the United States was a have-not Nation in terms of discovered and developed uranium reserves. The Atomic Energy Commission by extending substantial incentives to American industry, embarked upon an ambitious program of exploration for uranium—the raw material essential to both the nuclear weapons program and the development of peacetime applications of atomic energy. As a result of this effort, the United States has, today, among the largest uranium reserves in the world, and, also, we have created a substantial uranium mining and milling industry.

Nevertheless, the Joint Committee expressed some concern about the viability of this new industry in the near-term. The government had recently announced cutbacks in the purchase of special nuclear material for military purposes (*ibid.*), and the projected increases in demand for uranium for private nuclear power purposes might not materialize as soon as predicted. For this reason, in preparing for the 1964 private ownership hearings, the Joint Committee had asked participants to address the question whether restrictions should be imposed on either "the importation of foreign uranium concentrates for enrichment and ultimate sale on the domestic market" or the "the importation of foreign-enriched uranium" (*1964 Private Ownership Hearings* 360).

In response to that inquiry, the AEC stated its "intent not to toll enrich uranium of foreign origin [for domestic use] * * *. This restriction would be removed July 1, 1975, when the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." *1964 Private Ownership Hearings* 5 (statement of AEC Chairman Seaborg). In response to further questions, Chairman Seaborg expressed the Commission's preference for enrichment restrictions over import tariffs, because the latter would be "a complicated field to enter for such a short period" (*id.* at 23).

One major uranium mining and milling concern, the Kerr-McGee Company, opposed the AEC's proposed moratorium on enrichment of foreign uranium. See *1964 Private Ownership Hearings* 196-198.[22] Instead of a fixed period of restriction, Kerr-McGee suggested that the AEC "not extend its services to [foreign uranium] intended for domestic use to the extent necessary to assure the development of a viable domestic uranium mining and milling industry" (*id.* at 198). This alternative, the company argued, would give the AEC "the flexibility to adjust protection to the actual situation" as it developed, rather than being bound by a rigid timetable (*id.* at 197). In effect, a flexible standard would allow the AEC to determine "whether protection is to be afforded and the extent and precise nature of such protection" (*ibid.*) and would enable the AEC to provide "such protection as may become necessary but only to the extent that it is necessary" (*ibid.*).

The Joint Committee accepted this aspect of the Kerr-McGee proposal.[23] The committee report explained that

[22] There was some debate over the desirability and proper scope of protection for the domestic industry. The Edison Electric Institute, an electric utility trade association, favored "a free market situation where electric utility systems will have access to all sources of uranium ore" but agreed that "temporary restrictions on foreign uranium ore importation may be necessary to assure the maintenance of a sound domestic mining industry" (*1964 Private Ownership Hearings* 47). One witness from the uranium industry stated that his company was "not concerned about 'low cost' foreign uranium destroying our domestic industry" and, in response to the question whether he had any fear of foreign competition, replied that his company "would not have any fear based on that premise" (*id.* at 207, 212-213 (statement of Robert W. Adams, President and Chairman of the Board, Western Nuclear, Inc.)).

[23] The Joint Committee did not embrace, and Congress did not adopt, all that Kerr-McGee suggested. Kerr-McGee had also proposed that the maintenance of a viable domestic uranium mining and milling industry be added to the statutory purposes of the AEC, and that the same objective be added to the criteria for the granting of licenses for importation and distribution of special nuclear material and source material (*1964 Private Ownership Hearings* 198). Neither of these suggestions was adopted. See also n.21, *supra*.

it preferred this approach to the fixed deadline proposed by the AEC because it imposed "a flexible restriction" that would allow the AEC "to review periodically the condition of the domestic and world uranium market and to offer enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium mining and milling industry" (*Private Ownership Act Report* 16). The Committee elaborated (*id.* at 31):

> The direction to the Commission not to offer services under this subsection for uranium of foreign origin is flexible both as to duration and degree of the restriction. While it is possible that by 1975 substantial amounts of uranium could be freely imported into the United States for enrichment and sale on the domestic market, one cannot at this time predict, with any degree of certainty, the condition of the domestic uranium industry a decade hence.
>
> Accordingly, the language of the bill will permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, in its opinion, the maintenance of a viable domestic uranium industry.

As this history suggests, Congress never considered the precise problem presented by this litigation. Section 2201(v) was enacted in order to maintain the viability of the domestic uranium industry as it passed from infancy to maturity; not to revive an industry caught in the throes of a sudden and precipitous decline. Nevertheless, the history

strongly suggests that Congress would have rejected the court of appeals' construction of the statute. The Joint Committee clearly had a very distinct objective in mind: the maintenance of a viable domestic industry. In order to achieve this objective, it expressly rejected the rigid approach proposed by the AEC: a complete moratorium on enrichment of foreign uranium until 1975. Instead, Congress adopted a flexible approach that requres the agency continuously to monitor market conditions and to formulate an opinion as to what level of restrictions, if any, would at any given time make the domestic industry viable.[24] In contrast, the court of appeals' construction ignores the purpose of the statute, and treats the imposition of restrictions as if it were an end in itself. The lower court's rigid and mechanical rule—"that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed and must become increasingly aggressive, to the point of 100% restriction" (Pet. App. 17a)—is exactly the opposite of the approach chosen by Congress.

2. Although Congress made a number of firm decisions in the Private Ownership Act—such as the decision to permit private ownership of enriched uranium—it was acutely aware of the unpredictable nature of the future, and of the inevitable need for periodic review and revision in the

[24] This is not to say, of course, that the agency (now DOE) has flexibility in deciding whether to comply with the statue (see pp. 25-26, *supra*). Rather, the statutory command is flexible in that it requires a level of restrictions that depends on DOE's expert judgement of the condition of the domestic industry and the effect that restrictions would have on that condition. The court of appeals seems not to have grasped this distinction; it interpreted DOE's finding that it could not acheive the statutory goal through the statutory mechanism as a decision "to abandon the statutory goal" (Pet. App. 18a). It is the court of appeals, however, and not DOE, that has lost sight of the provision's purpose.

legislation. As the Joint Committee expressed it (*Private Ownership Act Report* 19):

> The future holds many uncertainties. The Congress and the executive branch will have to be continually alert to the effect of this legislation on the competitive structure of the atomic energy industry. * * * In short, and in the words of the framers of the Atomic energy Act of 1946, 'It is recognized that many unforeseeable developments may arise in this field requiring changes in the legislation from time to time.'

In light of this commitment to revisit the statute in the event of "unforeseeable developments," it is significant that Congress *has* legislated on the question of the viability of the domestic uranium industry since the calamitous events of the late 1970's and early 1980's. Moreover, it is significant that Congress essentially *rejected* the solution to the problems of that industry imposed by the court of appeals in the decision below.

In March 1982, in direct response to the difficulties of the domestic uranium industry, the Senate approved a Nuclear Regulatory Commission authorization bill that would have limited imports of both natural and enriched uranium to no more than 20% of domestic nuclear fuel needs. See 128 Cong. Rec. 5751 (1982). When the authorization bill went to the Conference Committee, however, the Senate's approach was rejected in favor of a more moderate measure. The Conference proposal would have required DOE to modify its enrichment criteria so as to encourage greater consumption of natural uranium (but *not* to restrict enrichment of imported uranium) if imported uranium exceeded 37.5% of domestic requirements in any consecutive two-year period. *Id.* at 26799-26801. The Conference Committee further proposed that DOE be required to report annually on the viability of the domestic

uranium industry, that DOE findings be made the trigger for investigations under the trade laws by the United States Trade Representative and the Secretary of Commerce, and that, during the pendency of an investigation by the Secretary of Commerce, any new contracts for uranium imports would be unlawful. *Ibid.*

Yet even this compromise measure endorsed by the Conference Committee met with vehement opposition on the House floor. See 128 Cong. Rec. 28537-28544 (1982). Leading the debate, Congressman Frenzel denounced restrictions on foreign uranium as an "unfair[] trade barrier" (*id.* at 28537) that would "bypass[] the injury test required in our [trade] law" despite the fact that "[t]he domestic uranium industry's problem is not imports, but a low demand" (*ibid.*). Any provision that might lead to mechanical imposition of restrictions was specifically criticized as "bad economic policy, • • • bad politics, • • • bad government" (*id.* at 28539 (remarks of Rep. Gibbons)).

The opponents of the Conference Committee proposal recognized that "we have a problem" in the uranium industry, but argued that restricting imports "not only misanalyze[s] the cause of the problem but • • • will exacerbate other problems that we have not just with trade, but also in terms of nonproliferation" (128 Cong. Rec. 28540 (1982) (remarks of Rep. Markey)). "[L]imiting competition for foreign uranium imports," they concluded, would "not • • • accomplish" the rejuvenation of the domestic industry and would be "both inequitable and shortsighted" (*id.* at 28543 (remarks of Rep. Gore)). This view prevailed and, by a vote of 241 to 148, the House of Representatives rejected the Conference Committee report. *Id.* at 28543-28544.

Accordingly, the legislation that ultimately became Section 2210b was rewritten. See 128 Cong. Rec.

S15136-S15317 (daily ed. Dec. 16, 1982). As enacted, Section 2210b "simply provides for the study of the viability of the domestic uranium mining and milling industry" (128 Cong. Rec. H10462 (daily ed. Dec. 20, 1982) (remarks of Rep. Frenzel)). Congress specifically repudiated the suggestion that "any specific level of imports should govern • • • import restrictions or relief," and reaffirmed that the Executive Branch "should be able to act as [it] sees fit, and not be bound by the import percentage which generated the study" (*id.* at H10463 (remarks of Rep. Frenzel)).

The 1982 legislative history takes on new meaning when considered in light of Congress's express commitment in 1964 to respond to unforeseen developments with new legislation. In enacting Section 2210b in 1982, Congress directly confronted a problem that was not foreseen in 1964—the sudden collapse of a mature domestic uranium industry—and expressly rejected a solution that would have imposed a mandatory restriction on uranium imports. Significantly, the reason Congress rejected a mandatory cutoff was, at least in part, because of a recognition that such a measure would "not accomplish" its intended result (see p. 36, *supra*). The court of appeals, by construing Section 2201(v) to require an automatic cutoff of all enrichment services to foreign uranium, even though the Secretary has concluded that this would not accomplish the statutory goal, has essentially awarded respondents the relief they were denied by Congress. Such a result would of course be required if it were compelled by Section 2201(v), but it is manifestly improper when the language of the statute in facts supports the opposite conclusion.

C. To The Extent That The Court Of Appeals' Decision Rests On Implicit Rejection Of DOE's Factual Findings and Legal Premises, It Is Clearly Incorrect

1. *Fact Finding*

The court of appeals may have disagreed with the Secretary's interpretation of Section 2201(v) in part because it assumed certain facts—not on the basis of any record below and contrary to the Secretary's view—about the effects of restrictions on the domestic uranium industry. The court found that Section 2201(v) "instructs that when domestic nonviability is determined, restrictions on enrichment of foreign-source uranium must be imposed * * * *until the domestic industry is rejuvenated and becomes viable*" (Pet. App. 17a (emphasis added)). Similarly, the court of appeals stated that "DOE cannot accomplish its statutory purpose—the maintenance of a viable domestic uranium industry—*without imposing restrictions*" (*id.* at 18a (emphasis added)), and that when the domestic industry is not viable, DOE must impose "and continue to increase restrictions *until the domestic industry becomes viable*" (*ibid.* (emphasis added)).

Underlying all these statements is the unstated premise that restrictions *would* lead to viability. But the court of appeals had no warrant for assuming or relying on any such finding. The district court did not find that restrictions on enrichment of foreign uranium would lead to viability; it had made no factual record at all, because it held that the only fact that mattered was one as to which the parties agreed—that the domestic industry was not viable. The court of appeals ostensibly adopted the same approach, while nevertheless apparently assuming (contrary to DOE's uncontradicted assertion) that restrictions would produce viability.

There are, or course, circumstances in which restrictions on enrichment of foreign uranium would raise the price of uranium enough to revive the domestic industry—Section 2201(v) assumes as much. But the Secretary concluded that in the present circumstances—where the world uranium market suffers from chronic oversupply, where DOE has lost its monopoly on enrichment services, and where there is an active secondary market in enriched uranium—the exact opposite is true. On respondents' motion for summary judgment, the court of appeals was required to accept the Secretary's factual assertions as true. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-588 (1986), citing *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). If the court of appeals was unwilling to accept the Secretary's unchallenged assertions, the proper course, at most, would have been to reverse the grant of summary judgment for respondents and remand for further appropriate proceedings. What was manifestly improper, however, was in effect to try to have it both ways—to assert that the effect of restrictions on viability is legally irrelevant, and yet to draw comfort from an unstated assumption that restrictions would in fact serve the statutory goal. To the extent that the court of appeals may have adopted this line of reasoning, its decision should be reversed.[25]

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[25] Alternatively, the court of appeals may have attributed this view of the facts to Congress, reading into Section 2201(v) a conclusive presumption that total restrictions, if maintained long enough, would bring about viability. The statute itself, however, nowhere suggests that Congress had such an attachment to a particular factual hypothesis, and the history of the Atomic Energy Act contains repeated expressions of Congress's realization that the factual circumstances surrounding nuclear power change constantly (see, *e.g.* S. Rep. 1699, 83d Cong., 2d Sess. 1 (1954)). Morever, to view Congress

2. *Viability*

The court of appeals' apparent view of the facts may also have been influenced by an unstated assumption about the meaning of viability under Section 2201(v). The definition of this crucial statutory term has never been considered in this litigation. All parties agreed, before the district court ruled, that the domestic uranium industry is not viable. Since then, respondents have maintained, and the lower courts have held, that this stipulation, by itself, is enough to trigger an obligation to impose restrictions. For that reason, the courts in this case have conducted no inquiry into the meaning of viability.

Nevertheless, the court of appeals may have been operating under an implict understanding of viability that differs from that of DOE. In DOE's view, a "viable" domestic uranium industry is one that can fulfill, at an acceptable cost, the nation's needs for special nuclear material used in both military and civilian applications. This is consistent with the purpose of Section 2201(v): Congress believed that a viable domestic uranium industry was important, not for its own sake, but because of its contributions to national security and energy goals (*Private Ownership Act Report* 30). But whatever viability was thought to mean in 1964, the 1982 amendments have eliminated any doubt about the meaning of this term. The statutory criteria adopted by Congress in Section 2210b clearly define viability primarily in terms of the industy's size, strength and costs. See 42 U.S.C. 2210b(c)(2), (4), (5), (6), (7) and (8). Similarly, the Secretary's criteria focus

as permanantly binding an agency with a conclusive factual presumption is to ignore the usual relationship between Congress and the Executive, in which expert agencies apply congressional policy to changing facts (see, *e.g.*, *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)).

on "the extent to which the domestic mining and milling uranium industry will be capable, at any particular time, of supplying the needs of the domestic nuclear power industry" (48 Fed. Reg. 45747 (1983)). Accordingly, in making viability assessments under Section 2210b, DOE has consistently focused on the industry's ability to fulfill the nation's nuclear energy requirements. See, *e.g.*, Energy Info. Admin., Dep't of Energy, *Domestic Uranium Mining and Milling Industry: 1985 Viability Assessment* 49-59 (1986); 10 C.F.R. Pt. 761 (viability criteria).

It is possible that the court of appeals may have understood viability differently—not in terms of the capability of the domestic uranium industry to serve the nation's needs, but in terms of its *profitability*. The two concepts are obviously related, because an industry that is economically unprofitable will eventually lack the strength and capacity to serve the nation. But the converse is not true: an industry may be very small and profitable, and yet lack the ability to satisfy the nation's nuclear requirements.[16] The distinction is important because a court that assumes that viability involves nothing but profitability would be much more likely to assume, as the court

[16] In this regard, it is significant that domestic production of uranium, although significantly curtailed, has not ceased. See Energy Info. Admin., Dep't of Energy, *Uranium Industry Annual 1986* at 36-37 (1987) (production figures). Moreover, although the Secretary found that the domestic industry was not viable in 1986, there are indications that the industry may be contracting to the point where the surviving producers will be profitable (see Energy Info. Admin., *Domestic Uranium Mining and Milling Industry: 1986 Viability Assessment* 54-55 (1987). But because the Section 2210b viability criteria focus on the industry's supply capacity and not just its financial condition, it is entirely possible that a profitable industry would nevertheless be too small to be viable in the statutory sense prescribed by Section 2201(v).

of appeals apparently did in this case, that a complete restriction on enrichment of foreign uranium would restore the domestic industry to "viability." On the other hand, a court that shares DOE's and Congress's understanding—that the industry's viability depends heavily on its ability to fulfill the nation's nuclear requirements at an acceptable cost—would be much less ready to assume that a complete restriction on enrichment of foreign uranium would eventually yield a "viable" domestic industry.

Again, if there were any question about the proper meaning of viability, the correct course would have been to reverse and remand for further consideration of this issue. Of course, under the court of appeals' professed theory of Section 2201(v) the meaning of viability is irrelevant. Once the domestic uranium industry is found not to be viable—whatever that might mean—then restrictions on enrichment of foreign uranium "must be imposed and must become increasingly aggessive, to the point of 100% restriction" (Pet. App. 17a). It is on that conclusion that the Tenth Circuit's judgment must stand or fall, and that conclusion was error.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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